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January 3, 2005

Elizabeth O' Donnell, Esquire
Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, Kentucky 40601

RECEIVED
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PUBLIC SERVICE
COMMISSION

Re: Case No. 2004-00498
Basham v. Momentum Telecom, Inc.

Dear Ms. O'Donnell:

Pursuant to 807 KAR 5:001, Section 12, please accept this letter as Momentum Telecom Inc.'s ("Momentum") Motion to Dismiss the above referenced complaint. There are two reasons the complaint should be dismissed. First, as discussed below, this complaint fails to state a cause of action upon which relief may be granted. Second, this dispute involves only international calls and is not subject to the subject matter jurisdiction of the Kentucky Public Service Commission.

I. Facts.

The Complainant, Georgia Basham, has refused to pay for a series of international calls placed from her line and billed by Momentum at the applicable rates. There is apparently no dispute that the calls were placed from the subscriber's line. *See* Attachment to Complaint (referring to "these international calls *placed* without my knowledge or consent.") However, Ms. Basham states that international calls were placed from her number without her knowledge or consent.

The disputed calls were placed to a number in Sao Tome, an African island in the Gulf of Guinea. Numbers in this country are sometimes used by Internet Service Providers. Ms. Basham acknowledges there is a computer in her household which has a modem.

After discussion with the customer, Momentum offered a substantial goodwill credit to Ms. Basham. The offer was refused and Ms. Basham has changed carriers.

II. Subscriber Liability for Calls Originating from the Premises.

It is well established that a subscriber is liable for all long distance calls originating from the subscriber's line, whether placed by the subscriber or not. For nearly one hundred years Kentucky's highest court has recognized an implied agreement under which the subscriber agrees to compensate the carrier for all messages originating from the subscriber's number. This implicit agreement arises from the carrier's duty to complete the calls the subscriber makes. *See Jones v. Cumberland Telephone & Telegraph Co.*, 130 S.W. 994, 995 (1910); *cf.* 47 U.S.C. § 201(a) (describing the duty of every common carrier to furnish communication service upon reasonable request). In addition, with respect to interstate and international calls, the FCC has held that it is not unreasonable for a carrier to hold customers responsible for charges resulting from the unauthorized use of their telephone systems. This is because the customer has the ability to control access to its equipment, including telephones and computer modems capable of accessing the network and completing a call. *See Chartways Technologies, Inc. v. AT&T Communications*, 6 FCC Rcd 2952 (1991). Various federal courts have recognized these principles in upholding customer liability for unauthorized calls. *See, e.g., AT&T v. Jiffy Lube Intern., Inc.*, 813 F. Supp 1164 (D. Md. 1993); *American Message Centers v. FCC*, 50 F. 3d 35 (D.C. Cir. 1995).

In this case, the pattern of calling suggests that the calls originated from the Basham's computer and may have been the result of a dialer program. However, the responsibility to control and/or secure the computer rests solely with the Bashams. Momentum's obligation as a carrier does not include responsibility to indemnify customers for the cost of unauthorized calls. Despite having no obligation to do so, Momentum offered a goodwill credit to the customer equal to 75% of the charges. The customer refused the offer and has not paid the invoiced amount.

III. Commission Jurisdiction.

This complaint concerns international calls completed by Momentum under authority granted by the Federal Communications Commission ("FCC"). As the Commission has recently stated, complaints concerning billing for international calls are within the jurisdiction of the FCC. *Chiu v. AT&T Communications*, Case No. 2003-00247 (July 1, 2003) (dismissing complaint related to international calls "on jurisdictional grounds"). Momentum requests that this complaint be similarly dismissed.

Please indicate receipt of this filing by placing your file-stamp on the extra copy and returning to me in the enclosed, self-addressed, stamped envelope.

Sincerely yours,

A handwritten signature in black ink, appearing to read "D. Brent", with a long horizontal stroke extending to the right.

Douglas F. Brent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been furnished by U.S. Mail this 3rd day of January, 2005 to the following:



Douglas F. Brent

Georgia A. Basham
1818 Asbury Place
Owensboro, KY 42303



First Class Mail

RECEIVED

JAN 04 2005

PUBLIC SERVICE
COMMISSION

FROM

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